IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 7

WILBURN BOAT COMPANY, et al.,

Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

PETITION FOR REHEARING.

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Comes now the said Respondent and petitions the Court to grant a rehearing, and upon such rehearing to affirm the judgment below.

And Respondent, so petitioning, respectfully shows:

The majority opinion holds that marine insurance is a matter of admiralty and maritime jurisdiction. It makes no question that *this* marine insurance policy is a matter of admiralty and maritime jurisdiction. It recognizes that this Court has power, in the exercise of the admiralty and maritime jurisdiction committed to it by the Constitution, to ascertain and declare the law that governs this case. It assumes that *this* Court has never before ascertained the admiralty rule that governs the case, and concludes therefrom that there is no admiralty rule to govern it. It refuses that exercise of the judicial power

of the United States that consists of ascertainment of the admiralty rule—in favor of the powers of the several states to declare the law that governs this matter of admiralty and maritime jurisdiction.

If there is any one continuity that the Constitution has been conceived to establish, it is the demarcation between the power of the national sovereign, and the state sovereigns, to declare law.

The conventions that produced the Constitution devoted most of their time to examining the various aspects of that demarcation. Perhaps no fact of our constitutional history is more certain than that our system was founded on the faith of a compact, consented to by the people, that such a demarcation *was* established by the Constitution—one that those who thereafter might be repositories of sovereign powers, federal and state, would respect.

The history of the formation of our Constitution leaves no doubt at all that if it had been supposed that thereafter the nation, or the states, could rightfully transgress the demarcation so established, the Constitution could not possibly have been adopted.

It is not conceivable that a new national sovereign should have been created, while local state sovereignties were at the same time continued, without fixing some permanent principles of the separation of their powers.

Even where problems of dual sovereignty are not undertaken, the first and fundamental characteristic of any constitutional system is, necessarily, and *de facto*: what sovereign is the source of the law?

The question raised by this Court's decision is the fundamental one: is there any *constitutional* principle

upon which the source of law in the admiralty and maritime jurisdiction is vested in the national sovereign on the one hand, or the several state sovereigns on the other? Or, is that a matter left at large by the Constitution, and thus subject to *ad hoc* determination in every case, as this Court may assign that aspect of sovereign power to the national sovereign on the one hand, or to local sovereigns on the other?

If there *is* a constitutional principle for the determination of that question, to ignore it was called by this Court, speaking by Chief Justice Marshal "treason to the Constitution." (*Cohens* v. *Virginia*, 6 Wheaton, (19 U.S.) 264, 403.

The majority opinion of this Court discovers no such principle in the Constitution. It mentions none, subsumes none. On the contrary, on considerations of policy which the majority considers to be "warnings", but which are not expressly or by any implication related to any demarcation of national and state powers made by the Constitution, it assigns the power to ascertain, declare—even to make—the substantive law governing a great field of *admitted* admiralty and maritime jurisdiction to the states, simply by refusing to exercise the admitted judicial power of the United States to ascertain and declare the substantive maritime law. It says: "We refuse to undertake the task."

To decide, now, as though no guiding demarcation between national and state power were to be found in the Constitution, is, indeed, "suddenly to jettison the whole history of the admiralty provision of Article III."

The assumption of the majority that there is no principle to be discovered in the Constitution that assigns power to declare the law governing the admiralty and maritime jurisdiction to the nation on the one hand, or to the states on the other, necessarily sends us back to the fundamentals of constitution-making. The Court contemporaneous with the Constitution, speaking by its great Chief Justice, made the principle very clear, as a principle arising from the terms and purposes of Article III. That Article of the Constitution commits "the judicial power of the United States" to this Supreme Court and such other courts as Congress from time to time establishes. The subjects of that judicial power of the United States, so vested in them, are ascertained upon two kinds of test—the nature of the parties, and the nature of the subject matter. Because these are plainly different, different considerations necessarily occasion the assignment of these two categories to national judicial power. These considerations are manifest from the nature of these two categories themselves, read in the context of a Constitutional document creating dual sovereignties.

> "It is manifest, that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly, we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens or foreigners, and between citizens and foreigners, it enables the parties, under the

authority of congress, to have the controversies heard, tried and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognisance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

"This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself; if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils."

Martin, etc. v. *Hunter's Lessee*, 1 Wheat. (14 U. S.) 304, 346-348 (1816, per Marshall, *C.J.*)

That this principle arises on the historical context, general frame, specific terms, and plain purposes of the Constitution, has not been considered an open question in this Court.

> " . . . the grant presupposes a 'general system of maritime law' which was familiar to the lawyers and statesmen of the country, *and contemplated a body of law with uniform operation.*" (Our emphasis) *Detroit Trust Co.* v. *The Barlum,* 293 U. S. 21, 43, (1934).

One thing is very plain: judicial power granted on that principle cannot be abdicated to the states without subverting the constitutional object of the grant. *Legislative* power may declare the law, or not. *Judicial* power, granted on the principle stated, cannot be exerted or abdicated at the pleasure of the federal tribunal, without subverting the object of national uniformity which was the very purpose of the grant. The opinion of the majority declines to exercise judicial power concededly vested in it by Article III, and so declines for the avowed purpose of destroying national uniformity.

> "It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In

doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

Cohens v. *Virginia*, 6 Wheat. (19 U. S.) 264, 404.

To exercise the judicial power of the United States is not to refer judgment to state laws, where that jurisdiction is given by the Constitution because of the nature of the subject matter—the need of national uniformity.

The cases just quoted are landmarks of our law upon the question whether the sovereign power of the several states, or the judicial power of the United States, is authoritative as to the law that governs matters that the Constitution assigns, by reason of their subject matter, to the judicial power of the United States. These expressly include "all matters of admiralty and maritime jurisdiction." This Court, so far as we can find, has never doubted that the constitutional principle so declared, for the purposes so described, fully applies thereto.[1]

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[1] There are a few instances in which the substantive admiralty law itself is that the granting of an admiralty remedy is discretionary, much as the granting of equitable relief turns on the adequacy of legal remedy. The principle referred to does not change the substantive maritime law in that respect, and has no application thereto. In such cases the constitutional principle is fully observed by applying the admiralty rule that admiralty relief is discretionary, as, where the matter arises between foreigners. **Canada Malting Co. v. Paterson Co.**, 285 U.S. 413, 422-423 (1932). That represents no surrender of federal judicial power in favor of state powers, as the court there affirms.

"The case of **Cohens v. Virginia**, 6 Wheat. 264, 404 and **McClelland v. Carland**, 217 U.S. 268, 281, denied the right to abdicate to state courts jurisdiction which the Constitution in positive terms entrusts to the federal judiciary."

Canada Malting Co. v. Paterson Co., supra 423.

"The objection is founded upon the assumption, that these rules involve a question as to the extent of the admiralty jurisdiction granted by the Constitution. And as the court could not, consistently with its duty, refuse to exercise a power with which it was clothed by the Constitution and laws, the appellants insist that the alteration made by the rule in 1858 must be regarded as an admission that the court had fallen into error when it adopted the rule of 1844, and had exercised a jurisdiction beyond its legitimate boundary; and if the admiralty court had not the right to enforce a State lien in a case of this kind, the rule then in force could not enlarge its jurisdiction, nor authorize the decree of the Circuit Court which supported and enforced this lien.

"The argument would be unanswerable, if the alteration related to jurisdiction; *for the court could not, consistently with its duty, refuse to exercise a power which the Constitution and law had clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right.*" (Our emphasis)

The Steamer St. Lawrence, 66 U. S. 522, 526 (1861)

" 'One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.' "

Chelentis v. *Luckenbach S. S. Co.,* 247 U.S. 372, 382 (1918)

"It is remarkable, too, that the words, 'all cases of admiralty and maritime jurisdiction,' as they now

> are in the constitution, were in the first plan of government submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately."
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> *Waring, et al.* v. *Clarke*, 46 U.S. 440, 457 (1847)

The difference appearing between the majority and Mr. Justice Frankfurter is that the majority ignores the above-stated constitutional principle arising from Article III, upon which the power to declare the law governing the admiralty and maritime jurisdiction is assigned to the nation. For the constitutional principle is that in all matters assigned by it to final federal judicial power because of their subject matter, including all matters of admiralty and maritime jurisdiction, the judicial power of the United States is made supreme by a policy adopted as to such matters by that supreme source of law itself, namely, a policy of national uniformity. That may be good or bad policy, but it is the Constitution's policy; that act of the whole people does not contemplate that the law on matters so assigned to the federal judicial power shall fluctuate from state to state, but that it shall be uniform throughout the nation. Arguments may be made, pro and con, as to the desirability of nationally uniform law, as to one or another of the heads of federal judicial power assigned to national power because of their subject matter mentioned by Article III--arguments, that is to say, whether the Constitution was wise or unwise, in extending that policy to the one, or to the other. And the case for the wisdom, or unwisdom, of the Constitution may seem to different judges at different times con-

vincing as to one such head of jurisdiction, and unconvincing as to another. But if the Constitution is to result in any continuities at all, its wisdom or unwisdom cannot be taken *de novo* as every case arises. The principle that arises from the Constitution, the principle of national uniformity of law as to the substantive heads of the judicial power of the United States as to matters assigned thereto by the Constitution because of their subject matter, is not divisible by any test *that can be derived from the Constitution itself.*

The decision for national uniformity of law on the substantive heads assigned to federal judicial power because of their subject matter was an act of constitution-making, accomplished by the Constitution itself, part and parcel of the demarcation between national and local powers that that instrument was designed to make "constitutional" in our system—*viz.*, to perpetuate. If it is open to be overhauled on any head of such jurisdiction, as arguments of policy for or against the constitutional plan may, from time to time, be considered persuasive, it is no longer the policy of the Constitution that is observed but the policy of the majority of this Court. Speaking of the phrase "admiralty and maritime jurisdiction" as used in Article III, it has never been doubted that:

> "One thing, however, is unquestionable; *the Constitution* must have referred to a system of law coextensive with, and operating uniformly in, the whole country." (Our emphasis)
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> *The Lottawanna,* 21 Wall. (88 U.S.) 558, 575.

The law of marine insurance is, admittedly, integral to the admiralty and maritime jurisdiction. *Ins. Co.* v. *Dunham,* 11 Wall. (78 U.S.) 1.

What the majority does is to substitute its interpretation of "warnings" for the principle of the Constitution, which is the principle of national uniformity as to the law that governs the admiralty and maritime jurisdiction. That, we submit, is to substitute the views of justices as to desirable constitutional policy for the constitutional policy of the Constitution. It is respectfully submitted that if the constitutional principle is the rule that governs the exertions of soverign power, including the judicial power, that is an *ultra vires* act. Such considerations appear to underlie the different approach of Mr. Justice Frankfurter, who would recognize the constitutional principle, but would put this case outside the national uniformity principle in its facts. We beg to address a word to that.

Lake Texoma is relatively small. Argument could be made as to its thousands of miles of coastline, its thousands of vessels enumerated under federal authority, the federal authority presently exercised there by the United States Coast Guard—all appearing from the record.

Rather more significant than that, as we believe, Lake Texoma is, admittedly, part of the navigable waters of the United States; those are *not* small.

But more fundamental, as we submit, than any matter of mere physical extensity, is the circumstance that the Constitution is addressed to the problem of national uniformity of law—to a "political" problem and a constitutional solution of it; and that problem is encountered, and the need for the solution provided by the Constitution arises, whenever navigation is conducted across a state line. For then the matter concerns "more states than one." It is as clearly the problem to which the constitutional solution is addressed, when it arises only be-

tween Texas and Oklahoma, as it was between New York and New Jersey. (*Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1) (And, incidentally, this policy covered this vessel on the navigable waters of the United States *in five states*.)

As to the size of the vessel, that does not affect the political problem that arises respecting her when the question is, what law shall govern? That is the same problem, with the same difficulties and incidents, and, we must suppose, with the same constitutional solution, whatever the size of the vessel may be.

Nor does it appear to affect those considerations that the vessel was supposed to be confined to pleasure use only. No relevance of such a distinction is suggested, or appears, as to the political problem to which the constitutional solution is addressed, the problem of whether a national law shall govern. No such distinction has ever been regarded as relevant to any question of maritime *jurisdiction*. See *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 407-409, 426 (1940). And, finally, of course, the vessel was not used as a pleasure vessel.

Turning now to different considerations, the majority says that two questions arise, *viz.*, whether there is a judicially established federal admiralty rule; if not, whether this Court should "fashion" one.

The second question does not arise unless the first is negatively answered.

The first question is disposed of by the majority by saying that *this* Court never announced any rule on the problem presented by the case. The premise, thus taken for granted, is that no rule of admiralty and maritime jurisdiction ever exists that this Court has not stated.

That would wipe out most of the admiralty and maritime law at one blow.[2]

The Constitution refers to "matters of admiralty and maritime jurisdiction." When the Constitution took effect, this Court had rendered no decisions. On this Court's above premise, there was no law whatever to rule that jurisdiction! The whole history of our jurisprudence, before and since the Constitution, denies that premise. The Constitution refers to "cases in law and equity" and "suits at common law" and matters of "admiralty and maritime jurisdiction." There was—as a matter of undeniable historical fact—an existing body of law that fell under each of those heads, each of which was promptly applied as existing law by the courts exercising the judicial power of the United States. It would be as inconceivable to say that there was no rule of law governing the necessity of consideration for a contract, or clean hands in equity, until this Court declared it, as to say that there were no rules of maritime law until this Court states them. This

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[2] The judicial power of the United States under the Constitution is not vested in this Court alone, but in this Court "and in such inferior courts as the Congress may from time to time ordain and establish" (Art. III) and these other courts are invested to the full extent of their statutory jurisdiction with the full judicial power of the United States, as was decided long ago. **Osborn v. Bank of U. S.**, 22 U.S. 737 (1824) When the courts exercising the judicial power of the United States, including courts of appeal, have repeatedly announced the admiralty rule on the subject, the Constitutional fact that those courts in announcing that rule exercised the judicial power of the United States, would alone preclude assumption of the majority that there is no judicially established federal admiralty rule on the point—although the more fundamental consideration is that pointed out by Mr. Justice Reed and elsewhere herein, that upon those matters assigned to federal judicial power by the Constitution because of their subject matter the Constitution itself contemplated an existing and nationally uniform body of law—maritime law, common law, and equity.

Court proceeds to ascertain law *judicially*, from judicial sources, in common law and equity and admiralty. It does not proceed *legislatively*, on its unhampered views of policy, in admiralty. A typical example is *The Osceola*, 189 U. S. 158 (1903), where the particular existing admiralty rule was declared "upon a full review of all the cases, English and American," not one of which was a decisive decision by *this* Court of the particular rule so ascertained.

> "Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.
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> "One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country."
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> "The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on *what has been received as law in the maritime usages of this country*, and on such legislation as may have been competent to affect it." (Our emphasis)
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> *The Lottawanna*, 21 Wall. (88 U. S.) 558, 574-575, 576.

That there was at the time of the Constitution an existing body of law governing matters of admiralty and maritime jurisdiction has long been settled in this Court.

Panama R. R. Co. v. *Johnson*, 263 U. S. 375, and auth. cit.

That the very rule here contended for existed as to marine insurance when the Constitution was adopted, is cogently shown by the opinion of Mr. Justice Reed. That it has been declared many times since by federal courts exercising "the judicial power of the United States" in admiralty (with no cases to the contrary), not as a quasi-legislative determination, but as the ascertainment of admiralty law antedating the Constitution, is undeniable. (See, *e.g.*, *Aetna Ins. Co.* v. *Houston Oil & Trans. Co.*, 49 F. 2d 121; cert. den. 284 U. S. 628).[3]

It was not the argument of these petitioners that there is no admiralty rule on this subject. The lower court, in common with other federal courts, found there was, and what it was, and Petitioners did not make question as to that. The existence, and propriety, of the admiralty rule on this subject were not before this Court. Petitioners' position was that the admiralty and common law rule are the same, and equally subject to change by state power. A party is required to disclose his legal position to the other party, as an essential of that fairness which due process guarantees.

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[3] "The English rule is that express warranties are to be literally complied with. **Arnould on Marine Insurance** (11th Ed.) § 630. The federal courts have generally adopted this rule. In perhaps the first reported American decision, **Ogden v. Ash, 1 Dall.** 162, 1 L. Ed. 82, it was held that a warranty of this kind must be strictly complied with, . . ." **Aetna Ins. Co. v. Houston Oil & Trans. Co.**, 49 F. (2d) 121 at page 124.

It is difficult ot believe that fairness allows the Court to proceed by surprise, any more than it allows the party to do so.

But t..e effect of the majority opinion goes far beyond the mere loss of a judgment inflicted on a party. To lose a case is one thing. To lose the law is frightening.

Wherefore, the said Respondent prays that a rehearing be granted herein, and that upon such rehearing the judgment of the Court of Appeals herein, affirming the judgment of the District Court, may be affirmed.

Respectfully submitted,
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